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# Ontario Labour Relations Board HIGHLIGHTS

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## Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in July of this year. These decisions will appear in the July/August issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

**Bargaining Rights – Construction Industry – Representation Vote – Termination** – The employer filed an application for termination of bargaining rights under s. 65 – The union's only explanation for its delay (10 to 12 months) in advancing collective bargaining was inadvertence – The facts revealed the union had expressed a wish (through a letter and a clear notice to bargain) to engage in collective bargaining prior to the filing of the termination application – On review the Board found these facts similar to *Ticketmaster Canada Ltd.* (lengthy delay due to inadvertence), and found it appropriate, to direct a representation vote rather than terminate the union's bargaining rights – Although there was no prejudice to the employer, the delay was significant and there was no satisfactory explanation for it – Representation Vote ordered

**COMM-STRUCTION INC.**; RE: Universal Workers Union, Labourers' International Union of North America, Local 183; OLRB File No. 2704-12-R; Dated July 15, 2013; Panel: Caroline Rowan (8 pages)

**Employer Support – Interference with Trade Union – Unfair Labour Practice** – CUPE alleged the employer helped UFCW achieve certification in violation of sections 15 and 70 of the *Labour Relations Act* – The complaint hinges on the employer granting UFCW an opportunity to address employees during a mandatory orientation meeting, allowing the union to collect a sufficient number of cards to make an application for certification – CUPE also alleged that, on the day of the representation vote, the employer physically accompanied employees to the UFCW table – CUPE contends the employer's facilitation of UFCW's presentation at the orientation meeting constitutes a breach of the *Act* because: 1) the meeting was mandatory; 2) the employer did not present employees the option to absent themselves; 3) the employer stated it had a positive relationship with UFCW, signalling to employees that it preferred UFCW; and 4) no other union was given an opportunity to speak with employees during the meeting – The Board held that CUPE had failed to prove that the employer provided "other support" to UFCW or participated in its selection within the meaning of sections 15 or 70 of the *Act* – There was inconsistent evidence about the employer's conduct on the day of the vote and its conduct during the orientation meeting was not of such character and proportion to compromise the arm's length relationship between the employer and UFCW because: 1) neither the employer nor UFCW expressly conveyed to employees that the employer wanted them to select UFCW; 2) the employer's reference to its positive relationship with UFCW was not an endorsement; 3) the employees were told that it was up to them whether or not they wanted representation; and 4) no employer representative was present during the union presentation – Application dismissed

**COMPASS FOOD GROUP CANADA LTD. AND UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 175**; RE: CANADIAN UNION

OF PUBLIC EMPLOYEES, LOCAL 1974; OLRB File No. 3682-11-U; Dated July 17, 2013; Panel: Patrick Kelly, Richard O'Connor and Carol Phillips (12 pages)

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**Duty of Fair Representation - Trade Union** - The applicants allege that, in the lead up to the ratification of an MOU between the OSSTF, District 18 and the UGDSB, District 18 breached its Governing Documents thereby engaging in arbitrary and discriminatory conduct contrary to section 74 of the *Labour Relations Act* by: 1) not meeting directly with the applicants prior to and during negotiations; 2) not providing the bargaining unit with sufficient time to review the MOU before the ratification vote (other bargaining units were provided their MOU's much earlier); 3) sending the MOU to the personal email addresses of the bargaining unit; 4) holding a membership meeting for an hour and changing locations part way through to dissuade participation; 5) revealing the results of the ratification vote to UGDSB; and 6) not inviting the applicants to attend the counting of the ballots and subsequently destroying the ballots – The applicants request the ratification vote be declared null and void and that a second ratification vote be ordered – The Board held that monitoring a trade union's compliance with its governing documents is not within its jurisdiction, except insofar as it gives rise to an independent violation of the *Act* – The Board held that a *prima facie* violation of the *Act* was not made out – There was no violation of section 74 because the allegations did not concern the union representing employees with respect to their dealings with their employer – The allegation that other bargaining units received their MOU's earlier than District 18's bargaining unit does not amount to discriminatory conduct under section 74 because the provision is not concerned with conduct as between two separate bargaining units – The *Act* does not require a minimum amount of time between when the MOU is provided to the bargaining unit and the ratification vote; the *Act* rather requires that sufficient information be provided to the membership before a vote and there was no allegation that the information conveyed in the MOU or the membership meeting was inaccurate or misleading – The lack of consultation between the Chief Negotiator and the applicants does not amount to a violation of the *Act* – Nothing in the *Act* requires that certain persons be involved in counting ballots or that ballots be maintained for a particular amount of time before being destroyed – Application dismissed

**DIANE BALLANTYNE**; RE: ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION; RE: DISTRICT 18 Teachers' Bargaining Unit of the Ontario Secondary School Teachers' Federation; RE: Upper Grand District School Board; OLRB File No. 2776-12-U; Dated July 3, 2013; Panel: Jesse M. Nyman (16 pages)

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**Construction Industry Grievance – Discharge – Evidence** - ***Human Rights Code – Workplace Safety and Insurance Act*** – The Union alleged the employee was unjustly dismissed after filing a worker's compensation claim and it sought damages for breach of the collective agreement and the *Human Rights Code* – It also sought a declaration that the employer unjustly interfered with the employee's worker's compensation claim – The employer alleged the employee quit after a period of absence from work and failed to respond to an offer of modified employment – After a disputed workplace accident, the employee left the worksite and filed a worker's compensation claim – The employee provided the employer with medical documents advising he was unable to work for a specified period of time – The employee did not return to work and did not provide the employer with updates on his medical condition explaining his continued absence – The employer presented the employee an offer of modified employment, to which the employee did not respond – The employer advised the Eligibility Adjudicator of the WSIB that the employee had quit – The Adjudicator denied the claim and the employee appealed the decision, which is currently before the WSIB – During the hearing, the employer objected to the admissibility of the employee's WSIB and medical records – The Board held the evidence was admissible as "business records" within the scope of section 35 of the *Evidence Act* and pursuant to its discretion under section 48(12)(f) of the *Labour Relations Act* to admit the evidence having regard to: the principle that arbitration proceedings ought to be expeditious and non-technical, the nature of the issues, the nature of the records, the limited purposes for which they are relevant, and the failure of the employer to give clear notice of its desire to cross-examine – The Board held the employee was unjustly terminated – There was insufficient evidence of the employee's subjective intention to quit and the objective conduct to carry out that intention; the employee never stated he intended to quit and his absence from work was due to continued medical advice that he was unable to work – The termination was also found to be discriminatory because the employee was receiving WSIA benefits and was thus classified as disabled within the meaning of the *Human Rights Code*; his unjust termination constituted adverse treatment – The employer failed to rebut the inference of discrimination because no evidence was called explaining the decision to discharge the employee – The Board granted an award of $2000 for injury to dignity, feelings and self-respect under the *Human Rights Code* – Grievance allowed

**DOMINION FORMING INC.;** RE: Universal Workers Union, Labourers' International Union of North America, Local 183; RE: High-View Forming Inc.; RE: High-View Structures Inc.; RE: High-View Forming (1995) Inc., OLRB File No. 2370-11-G; Dated July 12, 2013; Panel: Ian Anderson (32 pages)

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**Bankruptcy – Employer – Employment Standards – Evidence** - Application to review an ESO's Order to Pay issued against T and I, two directors of now bankrupt AFC Food Group Inc., for the outstanding vacation pay of 23 employees – ESO issued the order, pursuant to section 81(7) of the *Employment Standards Act*, after relying on AFC's Corporation Profile Report, which identified T and I as directors within the 12-month period prior to AFC's bankruptcy – T submits the Report inaccurately listed him as a director because: 1) he was a non-resident of Canada for more than two years prior to AFC's bankruptcy; and 2) he resigned as director 1.5 years before bankruptcy – T provided the Board with copies of: his resignation letter, a letter from his assistant consenting to take over his directorship, and a shareholder resolution confirming his resignation – Cross-examination revealed that, even after his purported resignation, T spent 75% of his time in Canada running AFC's business and, during this time, AFC employees believed he was still in charge – Furthermore, after his alleged resignation date, the Report continued to list T as a director despite having changed other names on the list – The Board held that section 262(3) of the *Business Corporations Act* creates a presumption that a person is a director if the Report so states – T failed to rebut this presumption because he was unable to explain why the Report, from the period after he purportedly resigned, continued to list him as a director – Furthermore, even if he were a non-resident, he could nevertheless be a director since section 118(3) of the *Business Corporations Act* only requires one Canadian resident to sit on the Board of Directors and I was a resident – The Board drew an adverse inference from T's failure to: 1) call his assistant as a witness; 2) provide the Board with a copy of the corporate minute book; and 3) adduce evidence about where and when his corporate documents were signed – Application dismissed

**MICHAEL D. TOPOLINSKI, A DIRECTOR OF AFC FOOD GROUP INC.;** RE: Director of Employment Standards; OLRB File No. 1105-10-ES; Dated July 2, 2013; Panel: Gail Misra (10 pages)

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**Construction Industry – Employment Standards** – The employer asserted the employee was exempt from the Act since he drove a dump truck used to remove mud, asphalt, and other materials from construction sites and to supply aggregates to those sites – The Board noted the definition of construction employee under the Act was materially the same as under the *LRA*, and that the Board has determined long ago that the delivery of materials, including aggregate to construction site is not work in the construction industry – The Board noted the purposes of the two acts were different, however found no reason to reach a different conclusion on the facts of this case – First, finding such an employee exempt would extend the exemption to employees with no real connection to the construction industry and it would open the exemption to employees who deliver any number of materials to construction sites – Second, extending the exemption would not be consistent with strictly construing the exemptions as part of giving the Act the broad and liberal meaning established by the case law – Application dismissed

**O J D TRUCKING LTD. operating as OJD Trucking;** RE: Director of Employment Standards; OLRB File No. 1552-11-ES; Dated July 26, 2013; Panel: Jesse M. Nyman (5 pages)

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***Crown Employees Collective Bargaining Act* – Sale of a Business** – This is an application alleging a sale of business under section 69 of the *Labour Relations Act* ["*Act*"], modified by section 10 of the *Crown Employees Collective Bargaining Act* – Through a competitive bidding process, Ontario Clean Water Agency replaced American Water Canada Corporation as contractor to both Elgin Primary Water Supply System and Lake Huron Primary Water Supply System – OCWA hired former AWCC employees, who were represented by the Ontario Public Service Employees Union – OPSEU submits that when OCWA replaced AWCC as contractor, a transfer of an undertaking and a sale of a business occurred – The majority decision held that the awarding of the contract to OCWA did not constitute a sale of business – The majority found the facts of the present case to be more analogous to *Metropolitan Parking* than to *Thunder Bay Ambulance* because: 1) AWCC and OCWA's contracts were fixed-term contracts; 2) AWCC and OCWA competed with one another for the contract; 3) OCWA derived no benefit or know-how from AWCC when competing for the contract; and 4) the ex-employees of AWCC who were hired by OCWA were not what constituted the business of AWCC – Application dismissed

**ONTARIO CLEAN WATER AGENCY AND AMERICAN WATER CANADA CORP.,** RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION; OLRB File No. 0777-12-R; Dated July 31, 2013; Panel: Patrick Kelly, Paul LeMay, Shannon McManus (17 pages)

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**Bar – Certification – Construction Industry – Practice and Procedure – Termination – Timeliness** – On the same day that the employees voted in favour of a termination application, the union filed an application for certification – After waiting the customary five days for the parties to make post-vote submissions, the Board issued the final decision terminating the union's bargaining rights – The employer raised a timeliness objection in its response to the certification application – The union asserted the Board should exercise its discretion under s. 111(3)(b) and postpone consideration of the application for certification until the day after the final decision in the termination application – The Board concluded that postponing consideration of the certification application was consistent with a primary purpose of the Act: facilitating collective bargaining between employers and trade unions that are the freely-designated representatives of the employees – The Board also noted that a refusal to consider the application pursuant to s. 111(3)(c) would give effect to a rigid application of s. 7 where there was no mischief similar to *Bernel* – Certification application to proceed in normal course – Matter continues

**R.O.M. CONTRACTORS INC.;** RE: Labourers' International Union of North America, Ontario Provincial District Council; OLRB File No. 0892-12-R; Dated July 25, 2013; Panel: David A. Mckee (11 pages)

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**Discharge – Employment Standards – Reprisal** – Application to review order to compensate employee due to employer's reprisal, contrary to section 74 of the *Employment Standards Act* – While the *ESA* requires employees be granted nine paid holidays per year, ROMCO granted its employees eleven, but required them to work on Family Day – Employee was interested in taking Family Day off with pay – Employee consulted with Ministry of Labour about whether he was entitled to take Family Day off with pay – MOL's policy was clear that if employees are provided with more than nine paid holidays, they may not automatically be entitled to Family Day off with pay – Despite consulting with MOL, employee testified that he understood the issue to be a "grey area" nonetheless – Without authorization, employee did not show up for work on Family Day – Employer discharged employee on grounds of insubordination for absenting himself from work – The Board held that employee had no actual right to a paid holiday on Family Day since ROMCO was providing a greater benefit than the *ESA* – Furthermore, employee did not have a *bona fide* belief that he was entitled to the day off because: 1) his wife's email acknowledged that ROMCO had not violated the *ESA;* and 2) his consultation with MOL (whose policy is clear about Family Day) was inconsistent with his belief that the question was a "grey area" – Employee's discharge was not a matter of reprisal but rather a result of him absenting himself from work without authorization on a day he had been directed to be there – Order to compensate rescinded

**ROY MURCKLEN INDUSTRIES LTD. O/A ROMCO;** RE: TERRY KOCH AND DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 1219-09-ES; Dated July 23, 2013; Panel: Mary Anne McKellar (7 pages)

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**Bargaining Rights – Certification – Construction Industry – Practice and Procedure – Settlement – Unfair Labour Practice** – Local 183 and the Carpenters applied for certification and at issue was the effect of a settlement entered into 15 years ago, which had no term or expiry provision, where Local 183 had agreed not to apply for certification, as long as Saddlebrook employed Local 183 members at the wage rates and terms and conditions of the MTAABA agreement – The Carpenters and Saddlebrook argued that the Board must enforce the settlement pursuant to s. 96(7) and Local 183 argued that the Board does not normally give effect to agreements that seek to contract out of the Act – The Board began by relying on *Greater Niagara* for the proposition that it had the discretion to determine whether to enquire into a complaint under s. 96(7) – The Board noted the public policy in not allowing parties to contract out of the provisions of the Act has long been settled and while acknowledging the important public policy of encouraging and driving the resolution of disputes, respecting settlements agreed to and their crucial and essential role to promoting and maintaining labour relations peace and stability, found that the latter fundamental values did not prevail in this case for the following reasons: first, Local 183 does not agree that Saddlebrook has kept their part of the bargain and this issue would need to be litigated, which the Board does not believe to be necessary; second, the ability to make an application for certification to represent employees is a fundamental and core value of the Act – Here if the original certification proceedings had been dismissed, the resulting statutory bar would have been at most one year or a collective agreement would have given the possibility of displacement at no longer than 33 months (up against a commitment without end in perpetuity); third, where a party chooses to enter into an arrangement that is not only outside of the Act but explicitly calls for the Act not to apply or operate, it may do so at its peril – While the parties may be willing to take that risk there is no guarantee that the laws of the Province will not apply to them – Finally, the Board noted that *National Grocers* did not stand for

the principle that section 96(7) and the Board's authority to enforce settlements does not always trump the Board's jurisprudence about the inability to contract out of the Act or waive public rights, particularly when the settlement so blatantly asserts that – The Board refused to exercise its discretion to enforce the settlement and concluded the Minutes have no impact on the Local 183 application in these circumstances – Matter continues

**SADDLEBROOK CONSTRUCTION INC. AND/OR SADDLEBROOK MANAGEMENT CONSULTANTS INC. AND/OR 1256830 ONTARIO INC. O/A SADDLEBROOK SERVICES AND/OR PEMBERTON GROUP INC.**; RE: Universal Workers Union, Labourers' International Union of North America, Local 183; RE: Allied Construction Employees Local 1030, United Brotherhood of Carpenters and Joiners of America; OLRB File No. 3371-12-R; Dated July 19, 2013; Panel: Bernard Fishbein (20 pages)

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**Certification – Collective Agreement – Construction Industry – Ratification Vote –Termination – Timeliness – Voluntary Recognition** – The timeliness of two applications for certification made by LIUNA Local 183 and IUOE Local 793 depended upon the outcome of their applications under s. 66 to terminate the bargaining rights of CLAC Local 52, which had entered into collective agreements with Strabag – The Board found that the collective agreements entered into between Local 52 and Strabag were negotiated in good faith and that Local 52 was not an employer-supported union – The real issues in this case were whether Local 52 was entitled to represent the employees at the time the agreement was entered into, and whether the Strabag workers were deprived of the opportunity to choose their own bargaining agent because a collective agreement had been reached before they began work – The Board was satisfied that this collective agreement was reached in contemplation of Strabag starting work on the York project in July 2011; that CLAC was seeking work for its members and was anxious to provide the labour force that Strabag needed; that it hand picked workers from among its members and others on its Employment Assistance Service to ensure that it met Strabag's labour requirements; Strabag accepted those recommended by CLAC; the majority of the first group hired had been long-time members of CLAC; and once it was clear that work was to begin on October 3, 2011, the union held a ratification meeting on September 29, 2011 with the workers who were to start at Strabag the following week – At the ratification meeting everyone present signed membership cards although there was no obligation to do so; the union explained the terms of the agreement; and, the ten people present voted unanimously in favour of acceptance of the terms of the collective agreement – There was nothing in the evidence before the Board to suggest any level of coercion by the union in respect of the ten individuals – The Board concluded that the case was about a construction local of CLAC reaching a pre-hire agreement with a construction employer for a project for which the employer was the successful bidder – The majority of the workers ultimately hired had been members of the union at the time that their bargaining agent entered into the collective agreement with Strabag – The Board was satisfied that the case fell within the *Nicholls-Radtke* exception and that there was no basis for finding that the employees had no choice of bargaining agent or that they were forced to accept a collective agreement that had been negotiated before there were employees in the bargaining unit – All four applications dismissed

**STRABAG INC.** Universal Workers Union, Labourers' International Union of North America, Local 183, Applicant v., Responding Party v. Construction Workers Local 52, affiliated with Christian Labour Association of Canada (CLAC); OLRB File No. 2765-11-R; Dated July 26, 2013; Panel: Gail Misra (26 pages)

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The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

## Pending Court Proceedings

| Case name & Court File No. | Board File No. | Status |
|---|---|---|
| **Gate Gourmet Canada Inc.**<br>Divisional Court No. 276/13 | 3688-11-U | Pending |
| **Charles W. Colhoun**<br>Divisional Court No. 293/13 | 0260-12-U | Pending |
| **Robert Pardy**<br>Divisional Court No. 2004/13<br>**London** | 0501-12-ES | Pending |
| **Signature Contractors Windsor Inc.**<br>Divisional Court No. 231/13 | 3315-12-R<br>3316-12-R<br>3317-12-R | Pending |
| **Biggs & Narciso Construction Services Inc.**<br>Divisional Court No. 181/13 | 1307-10-R | Pending |
| **Weihua Shi**<br>Divisional Court No. 158/13 | 0273-10-ES | Pending |
| **Rail Cantech**<br>Divisional Court No. 127/13 | 1506-12-U | Pending |
| **Durval Terciera, et al**<br>Divisional Court No. 520/12 | 1475-11-U | Allowed<br>(Seeking Leave to CA) |
| **Bur-Met Construction**<br>Divisional Court No. DC-12-010 | 3893-11-R | Pending |
| **Vito Tarantino Ltd.**<br>Divisional Court No. 417/12 | 0356-12-R | Pending |
| **OSMWRC, et al**<br>Divisional Court No. 363/12 | 0784-05-G | Heard, Reserved |
| **Albert Tsoi v. UNITE HERE**<br>Divisional Court No. 330/12 | 3908-09-U | Pending |
| **Ontario Sheet Metal Workers' and Roofers' Conference, et al "(Flynn)**<br>Divisional Court No. 325/12 | 2730-11-JD | Pending |
| **IBEW, Local 894**<br>Divisional Court No. 321/12 | 3174-09-U | Pending |
| **EllisDon Corporation**<br>Divisional Court No. 310/12 | 0784-05-G | Heard, Reserved |
| **EllisDon Corporation**<br>Divisional Court No. 309/12 | 2076-10-R | Pending |
| **Hassan Hasna**<br>Divisional Court No. 83/12 | 3311-11-ES | Pending |
| **Landmart Building Corp.**<br>Divisional Court No. DC 12-346JR<br>**Hamilton** | 2519-11-R | Pending |
| **John McCredie** v. OLRB et al<br>Divisional Court No. 1890/11<br>**London** | 1155–10–U | Pending |

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|---|---|---|
| **Dr. Peter A. Khaiter** v. OLRB et al<br>Divisional Court No. 213/11 | 0816–10–U<br>0817–10–U | Dismissed; Seeking Motion to set aside |
| **Dr. Peter A. Khaiter** v. OLRB et al<br>Divisional Court No. 383/10 | 0290–08–U<br>0338–08–U | See above |
| **Pro Pipe Construction** v. Norfab Metal and Machine<br>Divisional Court No. 408/09 | 2574–04–R | Pending |
| **Dr. Peter A. Khaiter** v. OLRB et al<br>Divisional Court No. 431/08 | 4045–06–U et al | See above |